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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re GERARDO M., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. GERARDO M., Defendant and Appellant.	A122987 (Marin County Super. Ct. No. JV24449A)

INTRODUCTION

The minor, Gerardo M., appeals from a juvenile wardship proceeding under Welfare and Institutions Code section 602,[1] based on his participation with others in smashing the windows of a parked car while a two-year-old child was strapped in his car seat inside. Gerardo was found to have violated Penal Code sections 273a, subdivision (a) (child endangerment), and 594, subdivision (b)(1) (vandalism), and he was placed on two years' supervised probation. He appeals the finding on child endangerment only, as well as requesting a remand because the juvenile court failed to recite that it knew the underlying offenses were wobblers when it chose to treat them as

[1] All statutory references, unless otherwise indicated, are to the Welfare and Institutions Code.

felonies. Because we find the evidence was sufficient to show that Gerardo aided and abetted both crimes, and the court's decision to treat the offenses as felonies reflected a conscious exercise of its statutory discretion, we affirm the disposition and deny the request for remand.

THE FACTS

On June 19, 2008, 19-year-old Geronima Serrano lived with her parents and two brothers, Salvador Preciado, age 21, and Samuel Serrano, age 16, in Novato. Late that evening, Geronima drove Salvador's 2000 Cadillac Escalade to the store, with Salvador in the front passenger's seat and Adrian, Salvador's two-year-old son, strapped in his car seat in the rear, behind the driver's seat. They returned home after 11:00 p.m. and parked the car in the carport in front of the family home.

Adrian was asleep in his car seat, so they left him there while Geronima went inside to use the bathroom. Salvador went to the kitchen to fix Adrian a bottle before carrying him upstairs to his bed, which Geronima was going to get ready for him. Within five minutes of arriving home, before they had brought the child inside, there was a commotion outside which sent them and the other family members running out to see what was happening.

Salvador was the first one outside. He saw that the windows of his car had been smashed, and he heard Adrian crying. He did not see how the damage had been done, but he saw a group of seven or eight people running away toward a red car.

The back seat window on the driver's side, where Adrian was seated, had been completely broken out. Adrian was covered with broken glass. Salvador pulled his son out of the car through the broken-out window. Adrian was crying hysterically and shaking. Salvador pulled pieces of broken glass out of Adrian's ears, and carried him into the house to undress him. He found broken glass in the boy's diaper. Adrian continued to cry "nonstop" for two or three hours. Even at the time of the jurisdictional hearing, Adrian was fearful, startled easily, and became distraught at sudden noises.

Samuel had been upstairs in his bedroom when he heard running footsteps outside. Looking out his window, he saw a group of six to eight males running toward the parked Escalade. He recognized Gerardo, whom he had known since middle school and from playing soccer, as one of the group. Several of the members of the group were carrying baseball bats and began smashing the windows of Salvador's car, but Samuel did not see a bat in Gerardo's hands and did not see him personally inflict any damage to the car. When Samuel saw the men running toward his brother's car, he ran downstairs and out the front door. By that time the men had run away, and he could not identify any other participants in the attack. The assailants got into two cars, one red and one black, and sped off. The black car belonged to a woman who lived three doors away in the same apartment complex.

Geronima's boyfriend, David Kane, had been parked in his car across the street from the Serranos' home, reclined in the driver's seat, waiting for Geronima to return home. He was situated so that he could see the Serranos' home in his rear view mirror. He heard Salvador's car arrive home and waited for Geronima to come outside.

Shortly thereafter Kane heard a group of people running and male voices shouting as if they were "cheering each other on." He then turned around and saw five to seven males running around Salvador's car and heard windows shattering. He did not specifically see baseball bats, but he saw some members of the group swinging something at the windows of the Escalade. At the jurisdictional hearing, he identified Gerardo as one of the members of the group.

Both front and rear seat windows were broken on the driver's side of the car, as well as another window farther back on the driver's side, and the rear window on that side of the car. There were also new scratches on the car and shoeprints, including one on the rear door behind the driver's seat (nearest to where Adrian was seated), which dented the side of the car.[2]

[2] Officer Andres testified that the car door was dented, but Officer Damico described it as the rear quarter panel on the driver's side, above the wheel.

Kane saw a red sedan pick up some of the group and drive around the corner. It then stopped and some people from the red car transferred into a black Chrysler. One or two more people got into the red car. Both cars took off, with the red car in the lead.

Kane decided to follow them, but first retrieved a baseball bat from the trunk of his car to protect himself if necessary. As he began following the fleeing cars, Kane dialed 911 and reported the incident. He eventually was able to give the 911 dispatcher the license number of the red car.

At one point, the red car pulled over and allowed Kane to pass. Then it pulled into the street behind Kane's car, picking up speed, so that Kane also sped up to avoid being rear-ended. The red car then pulled alongside Kane's car, and someone in it threw something at Kane's car, which made a loud noise but did no noticeable damage. The right rear seat passenger in the red car leaned out of the window and was making hand gestures and shouting at Kane.

At approximately 11:30 p.m., Novato Police Officer Christopher Andres received a radio report of the incident while on patrol in the vicinity. After locating the cars in question he pulled over the red car, but the black car sped off. Kane took off after the black car while Officer Andres detained the occupants of the red car. Gerardo was a passenger in the red car. The other occupants were two other males.

Kane followed the black car another two to five miles until another police car pulled it over. The black car was occupied by a male and three females.

Officer Jerred Damico went to the victims' house, where he surveyed the damage to Salvador's Escalade. He noticed a shoeprint on the rear quarter panel on the driver's side of the Escalade. He photographed it with his cell phone, measured it using three-by-five inch index cards, and returned to the sites where both the black and red cars were detained. He compared his photo of the shoeprint with the shoes worn by the occupants of both cars. He and Officer Andres both testified that the distinctive diamond pattern on the soles of the shoes worn by Gerardo matched the shoeprint on the Escalade.

It was the prosecutor's theory that Gerardo's active participation in the vandalism was established not only by the witness testimony that he was part of the group, but also

by his shoeprint having been left on the Escalade, which showed that he personally kicked the car. Gerardo was the only person prosecuted in the case, as he was the only one whose shoes matched the prints.

Fred Waters, a private investigator who testified on behalf of Gerardo, also examined the shoeprint photos and prepared a trial exhibit comparing them with the shoes worn by Gerardo. Although he agreed that the shoeprint and Gerardo's shoes were made by the same manufacturer, he testified the print was not made by Gerardo's shoes because his shoes showed much more wear than the shoe that made the print on the Escalade.

Salvador testified at the jurisdictional hearing that replacing the broken windows in his car had cost approximately $1,800. At the time of the hearing the dent and scratches had not yet been repaired, so the full extent of the damage was unknown. However, one of the police officers, who formerly had worked in the automotive industry, estimated that the damage to the body of the Escalade would cost $500 to $1,000 to repair.

Although there was no testimony about gang affiliation, it was clear by the time of the dispositional hearing that the incident was gang-related. Gerardo admitted to the probation officer that he "kicks it" with gang members but denied being a member of a gang. His parents were concerned about his gang affiliation and lifestyle. Gerardo had left home about four days before this incident and was hanging out with his gang friends, whose company he said he preferred to that of his family. He told the probation officer that Salvador had instigated the attack by throwing gang signs earlier.

PROCEDURAL BACKGROUND

Gerardo was taken into custody after the car stop. On June 20, 2008, the district attorney filed a petition under Welfare and Institutions Code section 602, alleging one count of vandalism. (Pen. Code, § 594, subd. (b)(1).) On July 10, 2008, the petition was amended to add a felony count of child endangerment (Pen. Code, § 273a, subd. (a)), and the following day it was orally amended to add a misdemeanor count under subdivision (b) of the same section. The difference between the felony and the misdemeanor is that

the felony requires that the child be placed in "circumstances or conditions likely to produce great bodily harm or death," whereas the misdemeanor punishes conduct in the absence of such circumstances.

On August 19, 2008, the jurisdictional hearing was held. The court found the first two counts true and dismissed the misdemeanor child endangerment count as a "restatement" of the felony. The court specifically announced that it did not find beyond a reasonable doubt that Gerardo's shoes made the shoeprint found on the Escalade. However, it found the identification testimony of Samuel and Kane to be credible, and it placed significance on Gerardo's flight as evidence of guilt. It found that Gerardo was "clearly an accomplice" in the attack on the Escalade, regardless of whether he personally participated in vandalizing the car. It declared that "[b]oth counts would be felonies had they been committed by an adult."

The probation report noted that the two offenses were felonies, without acknowledging that they could alternatively be sentenced as misdemeanors, as the court's felony determination had already been made. Gerardo served 71 days in juvenile hall over the summer and was released on home detention when school began. The probation report noted Gerardo's cooperative behavior while in juvenile hall, his progress in achieving more regular school attendance, his recognition of the dangers of the gang lifestyle, and his desire to "turn his life around."

At the dispositional hearing on August 29, 2008, the court declared Gerardo a ward of the court under section 602. It granted him two years of supervised probation, including 101 days in juvenile hall, with credit for the 71 days already served. He was allowed to serve the remaining 30 days on electronic monitoring. Among the conditions of probation were stay away orders with respect to the victims, witnesses, and other occupants of the black and red cars. Gerardo was also ordered not to affiliate with gang members or wear gang clothing. Gerardo filed a timely notice of appeal.

DISCUSSION

Gerardo raises two issues on appeal. First, he claims the evidence was insufficient to support the child endangerment count because there was no evidence that he knew

there was a child in the car at the time of the vandalism. Second, both of the crimes were wobblers, and he claims the court failed to indicate on the record whether it was cognizant of its discretion to declare them either misdemeanor or felony offenses, as required by section 702 and rule 5.780, California Rules of Court.[3]

I. THERE WAS NO REQUIREMENT THAT GERARDO HIMSELF HAVE KNOWLEDGE OF ADRIAN'S PRESENCE IN THE ESCALADE IN ORDER TO BE FOUND IN VIOLATION OF PENAL CODE SECTION 273a.

Gerardo argues that he could not be found to have violated Penal Code section 273a because the evidence was insufficient to prove that he had the required mens rea. Because the attack on the car occurred at night and with great rapidity, he claims there was no substantial evidence that he was aware that Adrian was in the car at the time he and his friends vandalized it. He does not challenge the finding that he was guilty of vandalism, but argues that only a property crime was shown by the evidence.

We review the sufficiency of the evidence in a juvenile case in the same manner we review an adult conviction, drawing all reasonable inferences in favor of the judgment. The ultimate question is whether any rational trier of fact could have found the essential elements true beyond a reasonable doubt. (*In re Sylvester C.* (2006) 137 Cal.App.4th 601, 605; see generally *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.)

Penal Code section 273a provides in relevant part:

"(a) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering . . . shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years.

"(b) Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or

[3] All references to rules are to the California Rules of Court.

inflicts thereon unjustifiable physical pain or mental suffering . . . is guilty of a misdemeanor."

Gerardo cites the concurring opinion in *People v. Sargent* (1999) 19 Cal.4th 1206 for the proposition that the mens rea requirement for a direct infliction of abuse under Penal Code section 273a, subdivision (a) requires infliction of unjustifiable pain or mental suffering on a child with a "purpose" or "desire" to bring about such a result. But that argument misstates the holding of the majority opinion, that a direct infliction of abuse requires only a purposeful act, with a general criminal intent to perform that act. (*Id.* at p. 1224.) The second element of a felony violation is whether the act occurred " ' "under circumstances or conditions likely to result in great bodily harm or death." ' " (*Id.* at pp. 1215-1216.) That determination is made on the basis of matters extrinsic to the actor's intent.[4] (*Id.* at pp. 1222-1223; see also *People v. Valdez* (2002) 27 Cal.4th 778, 786 (*Valdez*).)

For indirect infliction of abuse, a perpetrator's behavior must exhibit "such a departure from what would be the conduct of an ordinarily prudent or careful person under the same circumstances as to be incompatible with a proper regard for human life." (*Valdez*, *supra*, 14 Cal.4th at p. 791.) This prong of the statute also requires willful conduct, but not a purpose or intent to cause injury. (*Id*. at pp. 782-783, 787-789; Pen. Code, § 273a, subd. (a).)

Gerardo contends that either prong requires a willful act *toward a child*. Without knowledge that a child was in the car, he argues, his act could not rationally have been found to inflict physical pain or mental suffering *on a child* and could not be found incompatible with a regard for human life.

The Attorney General seems to agree that knowledge of the child's presence in the car would be a necessary element for a violation of Penal Code section 273a,

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[4] "The actus reus . . . is infliction of unjustifiable physical pain or mental suffering on a child. Hence, the scienter requirement applies to such an act. There is no separate scienter which attaches to the phrase 'circumstances or conditions likely to produce great bodily harm or death.' " (*People v. Sargent, supra*, 19 Cal.4th at p. 1222.)

subdivision (a). However, he argues there was sufficient evidence to support a finding that (1) Gerardo himself was aware of the child's presence; or (2) someone in the group became aware that a child was present in the car at some point during the attack. In the latter case, Gerardo would be liable as an aider and abettor even if he had no personal knowledge of Adrian's presence.

Although it is a close question whether there was sufficient evidence that Gerardo himself knew of Adrian's presence in the Escalade,[5] we agree with the Attorney General's aiding and abetting argument.

Penal Code section 31 provides in pertinent part: "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission . . . are principals in any crime so committed." "To prove that a defendant is an accomplice . . . the prosecution must show that the defendant acted 'with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.]" (*People v. Prettyman* (1996) 14 Cal.4th 248, 259, italics omitted.) Once that mental state is established, the aider and abettor is guilty not only of the intended, or target, offense, but also of any other crime the direct perpetrator actually commits that is a natural and probable consequence of the target offense. (*Id.* at p. 260.) The natural and probable consequences doctrine is based on the recognition that those who aid and abet should be responsible for the harm they have naturally, probably, and foreseeably put in motion. (*Ibid.*)

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[5] All of the broken windows were on the same side of the car where Adrian was sitting, but the attack was of very brief duration, late at night, and the evidence did not establish Gerardo's exact location during the attack. The Attorney General argues that Gerardo's shoeprint on the door next to where Adrian was strapped in his car seat establishes that he was close enough to see Adrian. And based on that factual premise, he argues that the court could have inferred that Gerardo saw Adrian inside but nevertheless kicked in the door nearest to where he was seated. This argument, however, ignores the juvenile court's statement that it did not find proof beyond a reasonable doubt that the shoeprint on the car was left by Gerardo.

" '[A] defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator. His knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the perpetrator. It is the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense, which . . . must be found by the jury.' [Citation.]." (*Prettyman*, *supra*, 14 Cal.4th at p. 261; see also *People v. Hickles* (1997) 56 Cal.App.4th 1183, 1193-1194; *People v. Lucas* (1997) 55 Cal.App.4th 721, 727.) Under the natural and probable consequences doctrine "an aider and abettor is liable vicariously for any crime committed by the perpetrator which is a reasonably foreseeable consequence of the criminal act originally contemplated by the perpetrator and the aider and abettor." (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1577.)

The court specifically noted that Gerardo was liable as an "accomplice," and there was sufficient evidence that at least one member of the group that attacked the car became aware of Adrian's presence—and no evidence that the attack was halted out of concern for the two-year-old's safety.

While the attack occurred sometime after 11:00 p.m., there was sufficient light in the area for Samuel, in his upstairs bedroom, to see Gerardo's facial features well enough to "clearly" recognize him as one of the vandals. Kane testified that a nearby street lamp "lit the whole area." Moreover, the window directly next to Adrian's car seat was shattered so completely that Salvador was able to reach through the window and lift Adrian out of the car after he responded to the noise outside. In Salvador's words, "I took him out the window because there was no more window left . . . ." It may reasonably be inferred that whichever one of the group broke that window must have seen the child inside.

In addition, there was testimony that Adrian was crying hysterically after the attack, which further supports an inference that the vandals became aware of his

presence. Although Gerardo argues there was no evidence that he was crying *during* the attack, it is most improbable that Adrian waited until after all the damage had been done before he woke up and began to scream. Again, regardless whether Gerardo himself heard the child's screams, it is reasonable to infer that someone in the group did.

The brazenness of the attack further suggests that it involved " ' "such a departure from what would be the conduct of an ordinarily prudent or careful person under the same circumstances as to be incompatible with a proper regard for human life . . . ." ' " (*Valdez, supra*, 27 Cal.4th at pp. 783, 788, 791.) The fact that the gang members were shouting and "cheering each other on" during the attack shows that they were not operating stealthily so as to avoid a confrontation. Their conduct was extremely provocative and could have resulted in a violent confrontation with Salvador, his family members, or other individuals within earshot. (Cf. *People v. Hoang* (2006) 145 Cal.App.4th 264, 270.) The attackers were certainly guilty of criminal negligence, which is ultimately the mens rea required for indirect infliction of abuse under section Penal Code section 273a, subdivision (a). (*Valdez, supra*, 27 Cal.4th at p. 781.)

Even if Gerardo's only intent was to aid in the vandalism of the car, as noted above he would also be liable for aiding and abetting any subsequent offense committed by his confederates so long as that crime was a " 'natural and probable consequence' of the target crime." (*Prettyman, supra*, 14 Cal.4th at pp. 261-262.) The presence of a child in a car seat of a recently parked car is not so improbable as to relieve Gerardo of liability for the child endangerment count. This is especially true in this case, where it appears the group specifically targeted Salvador and may well have known he had a young son.[6] The attack occurred almost immediately after Salvador and Geronima returned home from the store, and Salvador testified that he saw the black car drive by as they pulled into the driveway. Thus, it is possible the gang members were watching their target and knew the child had been left in the car. However, we need not indulge that theory to find there was sufficient evidence for a true finding on the petition's allegation that Gerardo violated

[6] Gerardo is related to Salvador by marriage.

Penal Code section 273a, subdivision (a) by aiding and abetting a reckless attack on the Escalade while Adrian was inside.

II. THE JUVENILE COURT MADE THE STATUTORILY REQUIRED FINDING THAT THE OFFENSES COMMITTED BY GERARDO WERE FELONIES, AND ANY FAILURE TO FURTHER COMPLY WITH RULE 5.780(E)(5) DOES NOT REQUIRE REMAND.

Gerardo's second argument is that the court failed to make the determination required by section 702, namely, "If the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony." The court did state, "Both counts would be felonies had they been committed by an adult." The parties agree that both counts are, in fact, wobblers, although the court did not expressly acknowledge this fact when it declared them to be felonies. (Pen. Code, §§ 273a, subd. (a), 594, subd. (b)(1).)

Gerardo argues that under rule 5.780(e)(5), the court's statement was insufficient because it did not reflect an awareness that both counts could have been deemed misdemeanors or a conscious exercise of discretion to treat them as felonies.

Rule 5.780(e) provides as follows:

"If the court determines by a preponderance of the evidence in a section 601 matter, or by proof beyond a reasonable doubt in a section 602 matter, that the allegations of the petition are true, the court must make findings on each of the following, noted in the order: [¶] "(1) Notice has been given as required by law;[7] [¶] (2) The birthdate and county of residence of the child; [¶] (3) The allegations of the petition are true; [¶] (4) The child is described by section 601 or 602; and [¶] (5) In a section 602 matter, the degree of the offense and whether it would be a misdemeanor or a felony had the

[7] The Attorney General states that the court did not declare that notice had been given, the minor's birthdate and county of residence, or that he fell under the provisions of section 602. The court did, however, find that notice had been given and that the minor resided in Marin County at the end of the jurisdictional hearing. At the dispositional hearing, it declared Gerardo a ward of the court under section 602.

offense been committed by an adult. If any offense may be found to be either a felony or a misdemeanor, the court must consider which description applies and expressly declare on the record that it has made such consideration, and must state its determination as to whether the offense is a misdemeanor or a felony. These determinations may be deferred until the disposition hearing."

The Attorney General claims there was no error because the court specified that the crimes would have been felonies if committed by an adult.[8] He also claims that, even if there was technical noncompliance with the rule 5.780(e)(5), the error was not prejudicial. We agree.

The leading case is *In re Manzy W.* (1997) 14 Cal.4th 1199, 1209 (*Manzy W.*), where the Supreme Court explained the reasons for requiring an explicit finding on the felony/misdemeanor issue. First, of course, it governs the calculation of the maximum term of confinement, which can be no longer than the maximum term of imprisonment for an adult convicted of the same offense. (§§ 726, subd. (c), 731, subd. (c).) Requiring an express determination also ensures that the court was aware of, and consciously exercised, its discretion, including considering " 'the possibility of sentencing [the minor] as a misdemeanant.' " (*Manzy W.*, *supra*, 14 Cal.4th at p. 1208, quoting *In re Dennis C.* (1980) 104 Cal.App.3d 16, 23.)

In explaining the serious consequences of a failure to exercise the statutory discretion, *Manzy W.* noted that the potential prejudice from a felony finding includes its future use for purposes of impeachment or enhancement of sentence in a subsequent criminal proceeding, including under the Three Strikes law (Pen. Code, § 667, subd. (d)(3)(A)).[9] (*Manzy W., supra,* 14 Cal.4th at p. 1209.) Also, the stigma of an

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[8] The Attorney General also argues that the court made the misdemeanor/felony decision with respect to Penal Code section 273a at the time of the jurisdictional hearing by making a true finding on count two (Pen. Code, § 273a, subd. (a)), while dismissing the misdemeanor version of the offense contained in count three (Pen. Code, § 273a, subd. (b)). This argument ignores the fact that Penal Code section 273a, subdivision (a) is itself a wobbler, not a straight felony.

[9] Gerardo was not yet 16 years old at the time of the offense.

adjudication based upon an act amounting to a felony is a " 'blight upon the character of and is a serious impediment to the future of such minor.' [Citation.]" (*Ibid*.) For these reasons the Supreme Court has insisted upon strict compliance with section 702 to ensure the court has knowingly exercised its discretion.

In *Manzy W.*, however, the court never "expressly declare[d] that [the offense] was a felony." (*Manzy W., supra,* 14 Cal.4th at p. 1201.) It merely imposed a commitment to the California Youth Authority[10] with a maximum term of confinement calculated on the basis of a felony conviction. (*Ibid.*) Thus, there was a direct violation of section 702, and it was not possible to discern from the record whether the court "actually considered a lesser alternative term of confinement." (*Id.* at p. 1210.)

As a result of *Manzy W.*, juvenile courts must make an express declaration of the felony or misdemeanor treatment of the underlying crimes. In all of the cases in which a remand was ordered, the court had never expressly declared the crime a felony. (See, e.g., *In re Kenneth H.* (1983) 33 Cal.3d 616, 618, 620 (*Kenneth H.*); *In re Ricky H.* (1981) 30 Cal.3d 176, 191-192; *In re Eduardo D.* (2000) 81 Cal.App.4th 545, 548-549, overruled on other grounds in *In re Jesus O.* (2007) 40 Cal.4th 859, 867; *In re Jorge Q.* (1997) 54 Cal.App.4th 223, 238; *In re Curt W.* (1982) 131 Cal.App.3d 169, 185; *In re Jeffery M.* (1980) 110 Cal.App.3d 983, 984-985; *In re Dennis C., supra,* 104 Cal.App.3d at p. 23.)

Indeed, *Kenneth H., supra,* 33 Cal.3d 616 pointed out, "the crucial fact is that the court did not state at any of the hearings that it found the [offense] to be a felony." (*Id.* at p. 620, fn. omitted.) *Kenneth H.* specifically distinguished *In re Robert V.* (1982) 132 Cal.App.3d 815, 823, because in that case "a signed 'Findings and Order' which stated that the charged Vehicle Code *felony* was to run concurrent with a prior commitment was held in compliance with section 702 in that it was an 'explicit finding' of felony status."

[10] The Youth Authority is now known as the Department of Corrections and Rehabilitation, Division of Juvenile Facilities. (§ 1710, subd. (a); Pen. Code, § 6001.) It will be referred to hereafter as the "Juvenile Division."

(*Kenneth H., supra,* 33 Cal.3d at p. 620, fn. 6.) This distinction was cited with approval in *Manzy W., supra,* 14 Cal.4th at page 1208, footnote 6.[11]

Manzy W. refused to impose a rule of " 'automatic' " reversal whenever an error of this nature has occurred. Instead, it stated the test of harmless error as follows: "the record in a given case may show that the juvenile court, despite its failure to comply with the statute, was aware of, and exercised its discretion to determine the felony or misdemeanor nature of a wobbler. In such case, when remand would be merely redundant, failure to comply with the statute would amount to harmless error." (*Manzy W., supra,* 14 Cal.4th at p. 1209.) The ultimate test is whether "the record as a whole establishes that the juvenile court was aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement limit." (*Ibid.*)

In this case, unlike those cited above, the court did declare that the offenses both would be felonies "had they been committed by an adult," thereby satisfying section 702. It is true that there is nothing additional in the record to indicate the court's awareness that the crimes could be deemed misdemeanors.[12] Nevertheless, we think it highly unlikely that the court was ignorant of that fact. Instead, we view the court's statement as a conscious exercise of discretion under section 702.

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[11] *In re Robert V., supra,* 132 Cal.App.3d 815, was decided before rule 5.780 (formerly rule 1488) was adopted, at a time when former rule 1355 was in effect. Former rule 1355 contained no requirement that the court expressly declare it had considered whether the offense in question was a felony or a misdemeanor. That requirement was added to former rule 1488 as of January 1, 1998 (renumbered as rule 5.780 in 2007). Because *In re Robert V.* was decided before such a requirement was added to the rules, neither that opinion nor the subsequent Supreme Court commentary on it addresses whether a failure to comply with rule 5.780(e)(5) requires remand.

[12] The petition and probation report identify the offenses as felonies. We also acknowledge that the form for the clerk's minutes, which was signed by the court, provided a space where wobblers could be listed and declared to be either felonies or misdemeanors. This form contains no notation by the clerk or the court indicating that such a discretionary decision had been made. Nevertheless, because the court exercised its discretion in compliance with the requirements of section 702, we find no requirement of additional evidence in the record showing that the court understood the scope of its discretion.

This was not a case where the court simply referred obliquely to the counts as felonies. Rather, the language used by the court closely tracked that of section 702, thereby indicating it was aware of the requirements of that section and was making its discretionary determination. Indeed, section 702 does not require an explicit felony/misdemeanor finding *except* in the case of a wobbler. Thus, simply by making the finding as it did, the court effectively indicated its awareness that the offenses were wobblers. We can discern no other explanation for the court's choice of language.

Our conclusion is bolstered by the presumption of duty regularly performed under Evidence Code section 664, which would include a presumption that the juvenile court understood the offenses were wobblers. (See *People v. Jacobo* (1991) 230 Cal.App.3d 1416, 1430.) *Manzy W.* held this presumption did not apply where the court had "*violated* its clearly stated duty under" section 702 and "there is nothing in the record to indicate that it ever considered whether the . . . offense was a misdemeanor or a felony."[13] (*Manzy W., supra,* 14 Cal.4th at p. 1209.) However, we believe the statutory presumption does apply in the present circumstances, where the error was merely a departure from a rule of court that did not amount to a violation of section 702.

Of course, it would have been preferable for the court to make a statement on the record indicating its awareness of its discretion to treat the offenses as misdemeanors. We do not regard this failure as requiring a remand, however. In most of the cases remanded under the rationale of *Manzy W.*, the court had initially imposed a commitment to the Juvenile Division for a maximum term calculated by treating the underlying

[13] The opinion in *Manzy W., supra,* 14 Cal.4th at page 1209, incorrectly refers to this section as Evidence Code section 665.

offense as a felony.[14] (*Manzy W.*, *supra*, 14 Cal.4th at p. 1203; *In re Eduardo D.*, *supra*, 81 Cal.App.4th at p. 549; *In re Dennis C.*, *supra*, 104 Cal.App.3d at p. 19; *In re Curt W.*, *supra*, 131 Cal.App.3d at p. 185; *In re Jeffery M.*, *supra*, 110 Cal.App.3d at p. 985.) In such cases, any possibility that the court was ignorant of the misdemeanor option could potentially have had a significant impact on the period of confinement actually imposed.

On the other hand, where the court has knowingly exercised its discretion to declare the offense a felony, and its only error is the failure to comply with the second sentence of rule 5.780(e)(5), the calculation of the maximum term of confinement is not affected by the error. A complete failure to exercise discretion deprives the minor of his or her right to have a less onerous disposition considered by the court, and the failure to state that discretionary choice on the record calls into question whether the court has fulfilled its statutory duty.

Conversely, once that discretion has been exercised and announced, requiring an on-the-record statement of the court's awareness of the scope of its discretion appears to be intended primarily to create a clear record for appellate review, not to confer a benefit on the minor. At that point, the additional future collateral consequences of the felony finding, discussed in *Manzy W.*, *supra*, 14 Cal.4th at page 1209, are unavoidable; requiring the court to articulate its finding with more pristine clarity will not prevent such consequences from unfolding. Having concluded that the court's on-the-record declaration constituted the required exercise of discretion, a remand is unnecessary and

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[14] The notable exceptions to this observation are *Kenneth H.*, *supra*, 33 Cal.3d at p. 618, where the court committed the minor to a camp, rather than to the Juvenile Division (presumably with the maximum term of confinement calculated based on a felony violation), and *In re Jorge Q.*, *supra*, 54 Cal.App.4th at pages 227-229, where the court granted the minor probation, but specified a theoretical maximum term of confinement based on a felony designation. In neither case, however, had there been an express declaration by the court that the offense was a felony. (*Kenneth H.*, *supra*, 33 Cal.3d at pp. 618, 620; *In re Jorge Q.*, *supra*, 54 Cal.App.4th at p. 238.) The juvenile court in *In re Ricky H.*, *supra*, 30 Cal.3d at page 191, specified the maximum Juvenile Division commitment as the middle term for the felony offense, rather than the upper term, which at that time was a separate legal error.

would be a waste of judicial resources. In other words, the second sentence of rule 5.780(e)(5), unlike section 702, is "directory" rather than "mandatory." (Cf. *Manzy W.*, *supra*, 14 Cal.4th at pp. 1204-1207 & fns. 2 & 5; see also, *In re Richard S.* (1991) 54 Cal.3d 857, 865-866.) When not accompanied by a violation of section 702, such an error does not invalidate the resulting governmental action.

Indeed, under these circumstances, we question whether a claimed violation of rule 5.780(e)(5) can be raised for the first time on appeal. Defense counsel voiced no objection whatsoever to the court's statement declaring the felony nature of the offenses, nor did she raise any objection at the dispositional hearing. Generally, complaints about the manner in which a court makes or articulates its discretionary sentencing choices cannot be raised for the first time on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 351-356.) This rule applies generally to juvenile dispositions. (*In re Sheena K.* (2007) 40 Cal.4th 875, 880-889 [forfeiture rule applies to challenges to conditions of juvenile probation except when based on "facial constitutional defect"]; *In re Justin S.* (2001) 93 Cal.App.4th 811, 814-815 [same]; *In re Josue S.* (1999) 72 Cal.App.4th 168, 170-173; *In re Abdirahman S.* (1997) 58 Cal.App.4th 963, 970-971.)

The error is not forfeited by failure to object if the court fails entirely to record its exercise of discretion under section 702. (*Manzy W.*, *supra*, 14 Cal.4th at p. 1210 [defense counsel did not point out to the court its discretion to declare the underlying offense a misdemeanor].) The issue here, though, stands on a different footing. By failing to articulate that it knew the offenses could also be treated as misdemeanors, but that it elected to treat them as felonies, the court simply imposed a disposition "in a procedurally or factually flawed manner." (*Scott*, *supra*, 9 Cal.4th at p. 354; see also *In re Sean W.* (2005) 127 Cal.App.4th 1177, 1181-1182 [complete failure to exercise discretion, as distinct from a " 'procedurally or factually flawed' " disposition, is not forfeited by failure to object].) We therefore believe the forfeiture rule of *Scott* applies, and the issue was not properly preserved for appeal.

Finally, the Attorney General claims that Gerardo must demonstrate prejudice under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836.[15] Such a showing of prejudice is not required under *Manzy W.*, which, as discussed above, established a different standard for remand when a court has failed altogether to make the felony/misdemeanor designation under section 702.

Nevertheless, the *Watson* standard has been applied to similar sentencing errors. (*People v. Dobbins* (2005) 127 Cal.App.4th 176, 182 [failure to order supplemental probation report]; *People v. Coelho* (2001) 89 Cal.App.4th 861, 889 [failure to state reasons for sentencing choice]; *People v. Sanchez* (1994) 23 Cal.App.4th 1680, 1684 [same]; *People v. Barker* (1986) 182 Cal.App.3d 921, 941 [erroneous aggravating factor].)[16] Since the only error in this case was a violation of rule 5.780(e)(5), a *Watson, supra,* 46 Cal.2d 818, 836, standard of prejudice should apply. Gerardo should be required to show it is reasonably probable that he would obtain a more favorable result on remand.

We have no reason to believe that a remand is likely to result in Gerardo's offenses being declared misdemeanors. Although the court was lenient in its disposition, this did not signal its inclination to treat these crimes as petty offenses. The gang aspect of the case was obviously taken seriously by the court, as it imposed gang-related conditions of probation. That factor, together with the brazen nature of the offense, the serious property damage done, and the risk to human life and safety, made a misdemeanor finding unlikely. Nor can appellant reasonably argue that a disposition more lenient than two years on supervised probation would be likely on remand.

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[15] He cites *In re Jimmy M.* (1979) 93 Cal.App.3d 369, 373, which involved *Boykin-Tahl* error. (*Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.)

[16] The minor argues that prejudice is demonstrated by the fact that, if the child endangerment count had not been included in the petition, he would have been eligible for Deferred Entry of Judgment. (§§ 790, 791.) This claim challenges the prosecutor's charging discretion, rather than showing prejudice from the court's failure to articulate its knowledge that Penal Code section 273a, subdivision (a) is a wobbler.

Rather, the court appears to have adopted a "carrot and stick" approach. The carrot was the lenient disposition based on Gerardo's apparent sincerity in wanting to give up his gang lifestyle and "get his life back on track." By designating the crimes as felonies, however, the court retained a stick to use if Gerardo's efforts prove to be unsuccessful. A remand here would be an idle redundancy that is not required by *Manzy W., supra,* 14 Cal.4th 1199, or the other cases cited by Gerardo.

DISPOSITION

The juvenile court's disposition is affirmed.

_____
Richman, J.

We concur:

_____
Kline, P.J.

_____
Lambden, J.